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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

MAURICIO SORIANO

on Habeas Corpus.

B227856

(Los Angeles County
Super. Ct. Nos. BH007089)

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Peter P. Espinoza, Judge. Petition granted.

Benjamin Ramos, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Julie L. Garland, Senior Assistant Attorney General, Julie A. Malone, Supervising Deputy Attorney General, and Nikhil Cooper, Deputy Attorney General, for Respondent.

On March 9, 1992, petitioner Mauricio Soriano pleaded guilty to two counts of second degree murder and one count of attempted second degree robbery, admitted a Penal Code section 12022, subdivision (a)(1) firearm allegation, and was sentenced to 16 years to life in prison. At Soriano's fifth parole hearing, conducted on December 1, 2009, the Board of Parole Hearings (Board) granted him parole. The Governor reversed the grant of parole, and Soriano filed a petition for a writ of habeas corpus contending that the Governor's decision was not supported by evidence that he remains a danger to the public. We agree and grant the petition.

BACKGROUND

A. Commitment Offenses

In January of 1990, Soriano participated in a gang-related vehicle-to-vehicle shooting that resulted in the death of Pedro Navarette and an attempted robbery that resulted in the death of Jose Castro. Soriano was 17 years old at the time of these crimes. The record before us contains pre-plea and post-plea probation reports, abstracts of judgment, and Soriano's statements about the offenses to evaluating psychologists and the Board.

On the night of January 3, 1990, Soriano and four other members of the 18th Street gang went searching for a specific member of the rival Crazy Riders gang whom they believed was responsible for several drive-by shootings targeting 18th Street gang members. Soriano admitted to investigating officers that he knew what his fellow gang members intended to do and saw one of them place a shotgun in the bed of a truck. Soriano and "Scorpio" rode in the truck bed, while their three cohorts rode in the cab. When the group saw a white car believed to have been used in the drive-by shootings, the truck pulled alongside it. Scorpio fired the shotgun at the white car, killing Navarette. Navarette's brother, who was also in the car, was not injured.

On January 20, 1990, Soriano and other members of the 18th Street gang wanted to steal a car. They approached Castro's car after he parked it and ordered him to get out. Castro refused, and a member of the group—not Soriano—fatally shot Castro.

Soriano pleaded guilty to two counts of second degree murder and one count of attempted second degree robbery. He admitted allegations that a principal was armed in the commission of each murder. The trial court sentenced him to concurrent terms of 16 years to life for the murders and a concurrent term of 18 months for the attempted robbery.

B. Soriano's Testimony Against Accomplices in the Commitment Offenses

A 2005 letter from Deputy District Attorney Sean Hassett of the Los Angeles County District Attorney's Office states that Soriano testified for the prosecution at accomplice Juan Velasquez's preliminary hearing. The letter does not state when that preliminary hearing was held, but it was sometime after Soriano's 1996 transfer to prison from the California Youth Authority (CYA), where he was initially housed after he was sentenced. Hassett stated that, apart from promising to submit a letter to the Board if Soriano testified truthfully, he made no promises to induce Soriano to testify. Soriano testified notwithstanding his expressed concerns that other inmates would harm or kill him in retaliation. Hassett wrote, "Mr. Soriano testified over a period of about two days. In my opinion he testified truthfully. . . . He answered every question and did not try to minimize his involvement. His testimony was critical to the prosecution's case. He was the only one who could positively identify defendant Velasquez as being 'Scorpio' from 18th [S]treet, and the shooter on the murder of victim Pedro Navarette. [¶] . . . Mr. Soriano testified at great personal risk to himself, and without his assistance we would not have been able to successfully prosecute defendant Velasquez." The letter also refers to Soriano's "prior testimony against another co-defendant, Sergio Ochoa"

C. Social History

Soriano was the third of five children in his family. He was born on September 22, 1972, in Mexico. His parents had an unstable marriage and argued a lot, but there was no use of alcohol or drugs, no arrests, and no mental health problems in the family. His great-grandmother and an uncle raised him. In 1979 his parents separated and his mother moved to Los Angeles. In 1988 or 1989, Soriano and his brother joined

her in Los Angeles. He lived with an uncle for six or seven months, then moved in with his mother. His uncle and mother told the probation officer who prepared the pre-plea report that he was quiet and obedient. Soriano told the Board that his mother and all of his siblings live in California and they visit him in prison whenever they can. He also speaks to them by phone and corresponds with them. He corresponds with his father in Mexico every month.

Soriano attended school in Mexico for nine years, but after moving to Los Angeles, he was suspended during ninth grade and dropped out during 10th grade. He told the Board that he did not like school. The 2003 psychological evaluation reported that Soriano's "intellectual functioning is estimated to be low," and the 2007 evaluation stated that it "appeared to be grossly within the low average range." The 2007 evaluation reported that his reading and language skills were near the sixth-grade level, but his math skills were near the 11th-grade level.

Soriano worked as a janitor for a few months after arriving in the United States while he was living with his uncle. He stopped working when he moved in with his mother.

Soriano had no prior arrests. He joined the 18th Street gang when he was about 16. He explained to the Board that he lacked "family support," was home alone, and felt lonely. He met gang members and they listened to him, gave him marijuana and cocaine, and took him places. He "thought they were [his] family." Soriano told the psychologist who prepared his 1999 evaluation that he "stopped claiming his gang affiliation five or six years ago."

Soriano began using marijuana mixed with crack cocaine when he was about 15½ or 16 years old. He used these drugs "almost daily" for about a year and one-half with his fellow gang members. He denied selling drugs at any time, and had not used any drugs since his arrest. Soriano consistently denied using alcohol at any time. The 2006, 2007, and 2008 psychological evaluations referred to Soriano's history of using alcohol, without any apparent factual basis.

D. Prison Record

Soriano arrived at the CYA on May 6, 1992, when he was 19. He was transferred to the Department of Corrections and Rehabilitation (CDCR) on August 29, 1996, just before his 25th birthday. According to the Board, Soriano was disciplined for misconduct in prison on a total of three occasions. The Board discussed only an April 2002 charge of mutual combat. The 2003 psychological evaluation mentioned an October 1999 charge of unlawful assembly. The record does not indicate the date or nature of the third instance of discipline. (The 2006 and 2008 psychological evaluations, both prepared by Dr. Richard Starrett, erroneously report that Soriano had four instances of prison discipline.) Soriano admitted engaging in mutual combat in 2002, but explained that it began as horseplay. The correctional officers who reported the incident stated that they sprayed Soriano and the inmate with whom he was fighting with pepper spray, but ultimately had to strike them with batons to stop the fight. The 2003 psychological evaluation indicated that Soriano apparently did not initiate the violence, but admitted, ““It was partly my fault. I forgot to take a time-out. I couldn’t control my anger.”” Soriano told the Board that the incident began as roughhousing, but he lost his temper when the other inmate began shoving him. No one was hurt. If he were confronted with the same situation again, he would just walk away. Since 2002, he had ““been learning and . . . concentrating, motivating myself to, you know, that all the classes that I’m attending, I make sure I put it in practice, so that way, I can control myself and all my defects.”” He further explained that he had learned to “measure the consequences and to go away from the problems.” The presiding commissioner of the Board asked Soriano what he would do if someone were rude to him and called him a name. Soriano said that he would “ignore [the] comments and just walk away and just pretend like nothing happened, because I know it’s not worth it. I think I will suffer the consequences and that’s it.”

The Board also referred to a single “counseling chrono” (a file notation without disciplinary consequences) in 2000, but the record does not indicate what that entailed. Soriano has the lowest possible custody classification score.

Soriano learned English while incarcerated and completed his GED in 2007, after working on it for several years.

Soriano completed vocational training and received certificates in masonry, plumbing, and auto body repair. He worked as a cook at the CYA, and in adult prisons he worked as a visiting room porter, on the yard crew, assisting in education, and as a clerk. The Board noted that Soriano’s performance reports were “satisfactory and exceptional.”

Soriano completed numerous self-help and therapeutic courses on topics including anger management, conflict resolution, substance abuse, criminal behavior, relapse prevention, literacy, and “Criminal Gang Members Anonymous.” The 2007 psychological evaluation reported that Soriano had “a record of consistent participation in a variety of self-help activities.” He has also been “active” in lifer support groups since about 1999.

Soriano has regularly participated in Alcoholics Anonymous and Narcotics Anonymous since at least 1999. The Board referred to reviewing “a number of programming chronos indicating ongoing participation in NA and AA,” as well as one documenting his completion of a course called “Substance Abuse Criminal Behavior and Relapse Prevention Program.” The Board quizzed Soriano on his prior drug use and his knowledge and understanding of the 12 steps in programs such as AA and NA.

Soriano also told the interviewing psychologists in 2006, 2007, and 2008 that he was active in Bible study and in his religion. The 2007 report noted that he had participated in “fund raising for Evangel Home and other community causes.”

E. Mental Health Evaluations and Insight Into Offense

1. 2008 evaluation

The July 2008 psychological evaluation was prepared by contract forensic psychologist Dr. Richard Starrett. The report indicates it is merely an addendum to the 2007 psychological evaluation.

The 2008 evaluation includes Starrett's erroneous references to Soriano's use of alcohol and assertion that Soriano had four disciplinary incidents in prison, not three.

Starrett reported that Soriano did not have any serious mental health problems, but "would meet the diagnostic criteria for Conduct Disorder Group Type Adolescent Onset" and "Polysubstance Dependence, in a controlled environment remission" based upon his youthful involvement in gangs and drugs.

To assess Soriano's potential for violence if released on parole, Starrett used "an empirically based approach" consisting of "two separate assessment guides": the "Psychopathy Check List Revised (PCL-R)" and the "History-Clinical-Risk Management-20 (HCR-20)." He also used "an objective, actuarial assessment" of the risk of recidivism called the "Level of Service/Case Management Inventory" (LS/CMI).

Soriano's score on the PCL-R was "**low.**" Starrett wrote, "His personality traits (Factor 1) are at the 1st percentile, and his past antisocial behaviors (Factor 2) are at the 51st percentile."

On the HCR-20, Starrett ranked Soriano's "overall propensity for violence" in the "**low to low moderate** range when compared to similar inmates." Soriano's "age at the time of the crime, his involvement in unstable relationships, his instability in school and employment, being a substance abuser, having early maladjustment, and to a lesser extent, having some antisocial personality traits in late adolescence" constituted the "historical factors that predict future violence." Regarding the "clinical" aspect of the guide, Starrett wrote, "Mr. Soriano accepts responsibility for the crime as stated in the record and can identify key characteristics and what he has done to remediate them. He is responding to treatment. He does not have a negative attitude and he does not have

any active mental health symptoms. The inmate does need to be continuously involved in AA or NA. The recency of the inmate's [prison disciplinary] history record suggests some lingering impulsivity." With respect to the risk management aspect of the assessment guide, Starrett noted Soriano "has handled compliance, stress, and destabilizers pretty well albeit within the institutional setting. The inmate's parole plans seem feasible and appropriate. He does appear to have family support." Starrett also opined that Soriano "does not present as an imminent risk management problem in the community" and that he was not likely to violate parole.

On the LS/CMI, Starrett rated Soriano's risk of recidivism as "**low**." Starrett stated, "Elevations on this scale have to do with his controlling case, his [prison disciplinary] history, dropping out of school, his suspension from school, and his use of alcohol and drugs." (As noted, there is no evidence that Soriano ever used alcohol.) On the other hand, Soriano had "no violent history in the community, has upgraded himself educationally and vocationally, has a good work record, and is now very active in self-help and his religion. His parole plans seem reasonable and well developed. The inmate accepts responsibility for the crime and can identify key elements and how he is trying to remediate them. An additional factor to consider now is that this individual will parole to Mexico and will not be able to return to the United States."

Starrett further noted that Soriano was not a psychopath and "did not have a major mental illness at the time of the crime," which "decreases his violence potential and chance of recidivism upon release."

In response to a question by the 2003 Board regarding the "extent to which [Soriano] has explored the commitment offense and come to terms with the underlying causes," Starrett wrote, "Mr. Soriano accepts responsibility for the crime as stated in the record. He can identify key characteristics and how he has tried to remediate them. He realizes that he had a lot of problems as a child. He became a follower of these kids in the area. He wanted to be like them. . . . He appears to have spent a considerable amount of time attempting to understand his background and other influences in the controlling

case. [¶] It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate.”

2. 2007 evaluation

The 2007 psychological evaluation was prepared by contract psychologist Dr. Gary L. Hoffman. His diagnostic impression of Soriano was “Polysubstance Dependence, in a controlled environment [*sic*].” After interviewing Soriano and reviewing his records, Hoffman reported that Soriano “evidences insight into the negative effects of gang life and drug abuse,” “has made progress coming to terms with his crime,” “expresses remorse for the victims,” “sees his role in the crime as behavior due to his need to comply with gang expectations,” “has programmed at a high level in the correctional environment,” and has “shown maturity and responsibility in his record of near disciplinary-free behavior, vocational accomplishment, community involvement, and self-help.”

To assess Soriano’s dangerousness, Hoffman used “a number of research-derived risk factors that are associated with an increased risk of future violence.” With respect to the first factor, a history of violence, Hoffman noted that Soriano’s “[a]ntisocial conduct appears to have been restricted to a period of perhaps two years prior to his arrest in the controlling offense. However, the criminal behavior appeared at a young age and was related to employment instability, school instability and being a substance abuser. It was also premeditated. While incarcerated there was one incident of violence, a Mutual Combat that occurred in 2002.” The next pertinent factor was that Soriano “has been compliant with Board requests and treatment.” Hoffman cited Soriano’s minimum classification score; then five-year discipline-free record; “consistent participation in a variety of self-help activities such as anger management,” “NA and AA and Lifer’s Support Group”; community fundraising activity; religiosity; and vocational training.

With respect to Soriano’s insight, Hoffman wrote, “The inmate accepts responsibility for the crime and has insight into the underlying factors that promoted

criminal behavior. He verbalizes significant remorse for his actions and the consequences. He repeatedly describes himself as a changed man and is able to give numerous examples of prosocial behavior. He is not blaming others. Impulsivity appears to be attenuated and maturity is evident. He has taken a number of steps forward in verbalizing insight into his actions pertaining to the controlling offense.” Hoffman expressed some concern about the next factor, substance abuse, based upon Soriano’s history. Notably, Hoffman erroneously attributed to Soriano a history of alcohol abuse, as well as drug abuse. But he noted that Soriano acknowledged his predisposition for addictive behavior and availed himself of AA and NA to reduce the risk of relapse. Regarding the mental health factor, Hoffman concluded that Soriano did not presently or historically have any mental health issues. On the final factor, environmental risks, Hoffman wrote, “The inmate describes a strong network of support from immediate and extended family. He expresses an awareness of needing to make a new start in an area away from where he led his gang lifestyle. He plans to parole to Mexico. He evidences a positive attitude towards self-sufficiency and has acquired some skills that increase his probability for success.”

Based upon these factors, Hoffman concluded that Soriano’s “risk of violence or recidivism” “if released to a less controlled setting” was “low to moderately low.”

3. 2006 evaluation

The 2006 psychological evaluation was also prepared by Starrett. In the biographical section of his report, Starrett initially stated, erroneously, that Soriano had arrests for cocaine and marijuana, but later stated, correctly, that Soriano had no prior arrest history as an adult or a juvenile. Starrett also erroneously stated, as he did in his 2008 report, that Soriano had suffered four disciplinary incidents in prison and had a history of using alcohol.

As in his 2008 report, Starrett’s diagnostic impression of Soriano was “Polysubstance Dependent, in institutional remission.” Starrett did not include “Conduct Disorder.”

Starrett reported that Soriano “states that he is remorseful about what happened. He takes the blame for his actions. He could have stopped it, but he did not try. ‘I was the youngest member there.’ He states that all of the ‘suffering that I’ve caused the families, I wish I could repair the damage.’” Starrett concluded Soriano has “insight into his criminal personality” and “is developing a prosocial attitude.”

Using the same set of factors relied upon by Hoffman in the 2007 evaluation, Starrett rated Soriano “in the moderate range” on the history of violence factor, and explained that this “is based on [Soriano’s] age at the time of the first violent act, relationship instability at the time, employment instability, school instability and being a substance abuser. Moreover, the crime appears to be premeditated.” Starrett rated Soriano “in the low end of the moderate range” on the clinical and insight factor, and explained that the “rating is based on the fact that he received a discipline in 2002, reflecting some impulsivity. He needs to be discipline-free for a significant amount of time.” But Starrett also noted, with respect to this factor, that Soriano has insight into his criminal personality, accepts responsibility for the crimes, expresses remorse, and “is trying to be prosocial.”

In the environmental risks and risk management category, Starrett rated Soriano “in the low range.” Starrett explained that Soriano’s “parole plans seem feasible,” he “handles stress well in [CDCR],” and he “is developing a prosocial attitude.” Starrett opined that Soriano’s “overall rating for propensity for future violence is decreasing across time. It is currently between the moderate and low range when compared to similar violent inmates. His rating will significantly decrease as the inmate becomes discipline-free and continues to be active in AA, NA and self-help groups.” Regarding other factors, Starrett noted that Soriano “appears to be taking care of” his risk of using drugs “by being involved in treatment,” “has been compliant with the Board’s requests,” and has no “complicating mental health problems.”

4. 2003 evaluation

The 2003 evaluation was prepared by contract psychologist Dr. Madeline M. Daniels. Her diagnostic impression of Soriano was “Polysubstance Dependence, in 1 [sic] remittance [sic].” She noted that Soriano “has certainly matured while incarcerated, and his insight into himself is greatly improved. There does appear to be some impairment in judgment.” But she believed that he “appears likely to comply with any conditions of parole.”

In assessing Soriano’s dangerousness, Daniels noted Soriano’s then-recent discipline for mutual combat and opined that he needed “to develop better judgment in social relations and in avoiding potentially violent situations.” Regarding Soriano’s risk of recidivism or violence if released, Daniels wrote, “His response to programming has generally been excellent. His substance abuse appears to be in a sustained remission. He has an excellent family support system to help smooth his transition into the community, and he has consistently worked to improve his vocational skills and employability. He has matured and gained better insight into his own behavior. At the time of his crime, he was described as ‘living in a childlike world’ and as having ‘many dependency needs.’ While incarcerated, he has learned to focus his energies in more prosocial and productive activities. [¶] Assuming Mr. Soriano remains drug-free, and that he continues to receive educational opportunities to remedy his academic deficiencies, his risk appears moderately low provided he has a structured positive support system (such as family, NA, job environment, parole agent, etc.) to help him resist the pressure of negative influences. Despite his intellectual deficiencies, he has made enough progress to suggest that he can succeed at parole if appropriate conditions exist.”

5. 1999 evaluation

Senior psychologist supervisor Dr. Russell L. Jordan evaluated Soriano in 1999. Jordan opined that Soriano did not “have any type of an active psychiatric diagnosis. His only problem, psychologically, is substance abuse and substance dependence. This problem seems to be in a sustained institutional remission.” Jordan further opined, “His

commitment to remain drug-free seems sincere and strong. Given the fact that his drug usage was for a relatively short period of time during his youth, he seems at low risk to relapse.” Jordan reported that Soriano “stopped claiming his gang affiliation five or six years ago.” Jordan opined, “He has matured greatly and has shown tremendous responsibility in prison. He has a great deal of remorse and empathy, such that most likely he would not re-offend in the community. He has taken a healthy and proper responsibility for his drug addiction and he continues to do what is needed, that being, remain in the programs of NA and AA.”

Jordan concluded Soriano “appears to be at very low risk to re-begin the use of drugs and/or street gang activities. He appears to be at low risk to commit further acts of violence.”

6. 1995 evaluation

Staff psychiatrist Dr. Jaime Blasquez evaluated Soriano in 1995, while he was still at the CYA. Blasquez reported a diagnostic impression that Soriano suffered from severe “Conduct Disorder, group type.” He noted that Soriano “has programmed very well throughout his incarceration at the [CYA]. The ward is well liked by his instructors, the staff of his company and his teachers. The ward should get involved in the 187 Group Program to develop full insight into his commitment offense, as well as to develop awareness of his past negative behavior and develop positive social skills. . . . It is my impression that the ward has matured and he is not tied up with his gang group and should continue with his present program.”

F. Parole Plans

Soriano has an immigration hold and will be deported to Mexico when he is paroled. Soriano plans to live with his father in Mexico and initially work in his father’s tile company, though he ultimately hopes to work in one of the three vocational trades he learned while incarcerated. Letters submitted to the Board offered him four other jobs in Mexico, as well. Three of those also offered Soriano a place to live, if he accepted the proffered job. In addition, Soriano’s uncle and cousin submitted letters offering him a

place to live in Mexico and assistance in finding a job. At the hearing, Soriano explained that he did not want to return to the United States because he had spent 20 years in prison here, he wanted to be free and enjoy being with his family, and he knew that if he returned to the United States, “it’s going to be worse than what it is right now and I don’t want that” He further explained that his family members residing in California understand that he must return to Mexico and are willing and able to visit him there occasionally.

Letters submitted to the Board by Soriano’s mother and siblings in California expressed love and extended emotional support for Soriano. At least one of his sisters offered financial support, as well.

At the hearing, Soriano told the Board that one of his “top priorities” upon parole is to find an AA program. He affirmed that there are AA programs in Mexico and said he had asked his father to locate one, but his father had not provided this information.

The 2008 psychological evaluation noted Soriano’s plan to live with and work for his father in Mexico and his “community support through the church, AA, and self-help.” It characterized his parole plans as “reasonable and feasible, if verified.”

G. District Attorney’s Position on Parole

Los Angeles County Deputy District Attorney Carol Chizever informed the Board that a member of her office who opposed Soriano’s parole at a prior parole consideration hearing was unaware of Soriano’s testimony for the prosecution, as described in Deputy District Attorney Sean Hassett’s letter. Chizever stated that her “personal point of view” was that the nature of Soriano’s crimes warranted “more time and more exploration in a state prison,” but in light of Hassett’s letter “and based on what the inmate has done positively in prison, and he has done quite well in the probably 16 years that he’s been in prison, I would just say to the Panel that I will submit without arguing and leave to [*sic*] the decision to the Panel as to whether he’s suitable or not.”

H. Soriano's closing statement to the Board

The Board permitted Soriano to make his own closing statement, in addition to that made by his attorney. He said, "I have changed in all the aspects of my life. I am a responsible, mature person. I try to do what is positive when I attend the classes and to put them into practice. I have understood the consequences of the crimes that I committed. The pain and the suffering that I caused the families, I feel embarrassed. I feel bad for what I did. I know that the damage is irreparable, but if I could—but if I could do something to repair the damage that I caused, I would do it gladly. I feel that I can reintegrate into society again because the life that I practiced more than 20 years ago, it was negative and I used to not measure the consequences. Now I have gone away from the gangs, from drugs and I live a clean life. The only thing that I ask you is if I would be able to say something to the victims' families, that they would forgive me for what I did. They would forgive my actions. I now understand how to value the lives of people and when I get out of here, I will never do that again. I guarantee to you and I assure you that when I do get out, I will never again commit the same errors that I committed in the time that I was involved with gangs and drugs. I wasn't thinking correctly. I was 17 years old and I felt manipulated by the friends that I used to hang out with. But I am different now and I'm very motivated to have a new life, to reunite myself with my family and with my other loved ones. That is why I feel very sure that I can reintegrate into society again."

I. Board's Decision and Governor's reversal

On December 1, 2009, the Board granted Soriano parole. The Board explained that Soriano had matured and grown, "enhanced" himself and his "ability to perform" on parole, improved his educational level, acquired vocations, continued his self-help programs, "shown significant institutional positive behavior," and acquired "insight into who [he was] and what [he did] and . . . some working tools that would serve [him] well if [he] continue[s] in a program such as AA or continue[s] in some form of religious program to keep [himself] well-centered." The Board found that he showed remorse for

his crimes and cited his testimony against his accomplices as demonstrating “a pretty significant depth as to the amount of turnaround that you’ve engaged in . . . at a great personal risk. You . . . were trying to right the wrong that you engaged in and identify the shooter in this matter.” The Board expressed some concern about the 2002 mutual combat incident, but concluded, “at this point with the further years under your belt in terms of self-help programming, you’d be able to handle that in a different manner and way here today. You’ve certainly improved.” The Board deemed Soriano’s parole plans in Mexico realistic and observed that he had maintained close ties with his family throughout his incarceration and acquired two vocations.

With respect to the 2008 psychological evaluation, the Board stated, “We are somewhat concerned about the low/moderate. . . . [B]ut reading more significantly into the psychological evaluation, we find that the low/moderate does hinge a great deal on your youth at the time of this crime. It is something that will elevate any psychological evaluation, and that’s primarily the reason you received a low/moderate. So we feel very comfortable with the psychological evaluation as it being a positive one, even with that.”

The Board summarized its conclusions by telling Soriano, “[Y]ou’ve done a wonderful job.”

The Governor reversed the Board’s decision on April 28, 2010. The Governor stated that he believed that Soriano would pose an unreasonable threat to the public if he were released, citing five factors: the “heinous” nature of the commitment offenses; Soriano’s prison disciplinary record; the 2006 through 2008 psychological evaluations; Soriano’s “limited participation in self-help programs to address his proclivity toward gang association”; and his failure to develop a drug-use “relapse prevention plan” and provide the Board with information on substance abuse support groups in Mexico.

J. Habeas Corpus Proceedings

Soriano filed a petition for a writ of habeas corpus in Los Angeles Superior Court on June 24, 2010. The court denied the petition, stating that it found the following factors to constitute some evidence to support the Governor’s finding that Soriano would

pose an unreasonable threat to public safety if released: his “serious, violent misconduct in prison, the concerns raised by his most recent psychological report, his failure to develop a relapse-prevention for his release and his lack of gang-related programming in prison.” We note that the trial court erroneously believed that Soriano had “four serious disciplines” in prison.

Soriano then filed a petition for a writ of habeas corpus in this court. We requested opposition, issued an order to show cause, and appointed counsel to represent Soriano. The Attorney General filed a return with exhibits, and counsel for Soriano filed a traverse. The matter was argued on May 17, 2011.

DISCUSSION

Soriano contends that the Governor’s decision violated his right to due process, in that the record does not support the Governor’s finding of current dangerousness.

A. The Applicable Law

Penal Code section 3041, subdivision (b) “provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction. [Citation.] And as set forth in the governing regulations, the Board must set a parole date for a prisoner unless it finds, in the exercise of its judgment after considering the circumstances enumerated in [California Code of Regulations, title 15,] section 2402 [or section 2281] of the regulations, that the prisoner is unsuitable for parole. [Citation.] Accordingly, parole applicants in this state have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, that they are unsuitable for parole in light of the circumstances specified by statute and by regulation.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 654 (*Rosenkrantz*).) In short, “parole is the rule, rather than the exception” (*In re Smith* (2003) 114 Cal.App.4th 343, 366 (*Smith*)), and every inmate has a liberty interest in parole that is protected by California’s due process clause (*Rosenkrantz*, at p. 660).

California Code of Regulations, title 15, section 2402 applies to inmates whose commitment offenses occurred on or after November 8, 1978. Subdivision (b) directs the Board to consider “[a]ll relevant, reliable information available to the panel” including “the circumstances of the prisoner’s social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner’s suitability for release.” (Cal. Code Regs., tit. 15, § 2402, subd. (b).) Subdivision (c) sets forth a nonexclusive list of circumstances tending to show unsuitability for parole, including an especially heinous, atrocious or cruel manner of perpetrating the commitment offense; a previous record of violence; an unstable social history; commission of sadistic sexual offenses; a lengthy history of severe mental problems related to the offense; and the commission of serious misconduct while incarcerated. (*Id.*, § 2402, subd. (c).) Subdivision (d) sets forth a nonexclusive list of circumstances tending to show suitability for parole, including the absence of a juvenile record, a reasonably stable social history, signs of remorse, significant life stress as a cause of the commitment offense, battered woman syndrome, absence of a significant history of violent crime, the inmate’s age, realistic plans for the future or marketable skills, and activities during incarceration indicating “an enhanced ability to function within the law upon release.” (*Id.*, § 2402, subd. (d).) These factors govern both the Board’s decision and the Governor’s review of the Board’s decision to grant parole. (*Rosenkrantz, supra*, 29 Cal.4th at pp. 660–661.)

“[T]he Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety” (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205 (*Lawrence*)). “[T]he core determination of ‘public safety’ under the statute and corresponding regulations involves an assessment of an inmate’s *current*

dangerousness. As noted above, a parole release decision authorizes the Board (and the Governor) to identify and weigh only the factors relevant to predicting ‘whether the inmate will be able to live in society without committing additional antisocial acts.’ [Citation.] These factors are designed to guide an assessment of the inmate’s threat to society, *if released*, and hence could not logically relate to anything but the threat *currently* posed by the inmate.” (*Id.* at pp. 1205–1206.)

The Board has broad discretion in deciding whether to grant parole. (*Rosenkrantz, supra*, 29 Cal.4th at p. 655.) “Resolution of any conflicts in the evidence and the weight to be given the evidence are within the authority of the Board.” (*Id.* at p. 656.) “But the statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1211.) “[U]nder the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public.” (*Id.* at p. 1212.) “[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public

safety.” (*Id.* at p. 1214.) “At some point, however, when there is affirmative evidence, based upon the prisoner’s subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner’s current dangerousness.” (*Id.* at p. 1219.)

An inmate who is denied parole is entitled to judicial review of the decision to ensure that “the decision reflects ‘an individualized consideration of the specified criteria’ and is not ‘arbitrary and capricious.’” (*Lawrence, supra*, 44 Cal.4th at p. 1205.) “[W]hen a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings.” (*Id.* at p. 1212.) Although this standard is deferential, it is not toothless. (*Id.* at p. 1210.) “[D]ue consideration’ of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness.” (*Ibid.*)

B. Analysis of the Governor’s Decision

1. Commitment Offenses

The Governor characterized Soriano’s commitment offenses as “especially heinous because multiple victims were involved.” Although Soriano was convicted of two murders, the Governor’s recitation of this fact fails to articulate any “rational nexus between those facts and current dangerousness.” (*Lawrence, supra*, 44 Cal.4th at p. 1227.) Notably, Soriano did not shoot either victim or instigate the crimes. Both murders occurred in January of 1990, when Soriano was 17 years old. He is now 38 years old and has been incarcerated for a little more than 21 years, including presentence custody. The Board and the psychologists who prepared the 2008, 2007, 2006, 2003, and 1999 evaluations recognized that Soriano has matured tremendously, accepts responsibility for the crimes, shows remorse, and has identified factors in his life and

personality that led him to become involved in the crimes and worked to remediate or overcome these factors. Neither the death of two victims nor any other fact regarding Soriano's 1990 crimes recited by the Governor shows that these offenses "are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*Lawrence, supra*, 44 Cal.4th at p. 1221.)

Accordingly, the commitment offenses do not provide "some evidence" that Soriano currently poses a danger to the public if released on parole.

2. Prison Disciplinary Record

The Governor was "also concerned that Soriano recently" engaged "in mutual combat with another inmate. This violent act indicates that Soriano has not addressed his impulse management and control. Indeed, when discussing the incident with the 2003 Board, Soriano admitted, 'I got into a fight, I couldn't control myself.' Soriano's admission is very concerning because it illustrates that, despite his involvement in self-help programs designed to address his anger management, Soriano failed to benefit from the skills taught in these courses. This evidence demonstrates that he is not ready to conform his conduct within society's laws or comply with conditions of parole, and that he may also be at an increased risk for reoffending in the community."

The mutual combat incident occurred in April of 2002, eight years before the Governor's decision, and now nine years ago. The 2002 incident cannot be characterized as "recent." Although it ultimately involved violence, it did not begin as such, and Soriano apparently did not initiate the violent aspect of it. The Governor's comment that Soriano's admission that he lost his temper demonstrated the inefficacy of his anger management courses ignores both the retrospective nature of the comment and the date it was made. Soriano was speaking, in 2003, of losing his temper in 2002. Soriano described to the 2009 Board the steps he had taken since 2002 to learn to deal with such situations without losing his temper or resorting to violence. His record of remaining free from any prison discipline in the nine years since 2002 constitutes evidence that Soriano has not only benefited from the self-help programs to which the Governor referred, but

has learned to control his anger and impulsiveness. The Board explored the 2002 incident at length and was convinced that in the many ensuing years, Soriano had obtained new skills that would enable him to handle the incident or other provocations without becoming violent.

As far as the record reveals, the 2002 incident was Soriano's only incidence of violence in the 19 years he has spent in prison and the CYA. His entire prison disciplinary history was mild, and, as noted by Dr. Hoffman in the 2007 evaluation, he "has programmed at a high level in the correctional environment." In sum, the 2002 incident does not constitute evidence that Soriano would pose a current danger to the public if released on parole.

3. Psychological Evaluations for 2006 through 2008

The Governor further cited Soriano's psychological evaluations from 2006, 2007, and 2008. He noted the 2008 report "assessed Soriano's future propensity to become involved in a violent offense to be in the 'low to low moderate' range," and that the "evaluations from 2007 and 2006 contained similar assessments of 'low to moderately low' and 'low end of the moderate range for future violence' based on his 2002 rules violation. The 2008 evaluator opined that Soriano's 'recent [prison disciplinary] history suggests some lingering impulsivity.' The fact that Soriano has consistently and recently been assessed in the moderate risk range, albeit at the low end, is troubling."

Initially, we note that the Governor seemingly misinterprets the ratings in 2008 and 2007. The overall 2008 rating was "**low to low moderate.**" Similarly, the overall 2007 rating was "*low to moderately low.*" These ratings are not fairly characterized as "moderate risk range." They were, instead, a range beginning at *low* and ending at "*low moderate.*"

On two of the three instruments Starrett used in his 2008 evaluation—the PCL-R and LS/CMI, he rated Soriano as a "low" risk. It was only on the HCR-20 that Starrett rated Soriano "low to low moderate." A review of the 2008 report reveals, as the Board discerned, that the higher end of the "low to low moderate" range rating on the HCR-20

was largely attributable to the historical aspect of that assessment guide, in which Soriano's rating was elevated by "his age at the time of the crime, his involvement in unstable relationships, his instability in school and employment, being a substance abuser, having early maladjustment, and to a lesser extent, having some antisocial personality traits in late adolescence." With respect to the other two aspects of the HCR-20, Starrett's comments were almost entirely favorable. For the "clinical" aspect, Starrett wrote, "Mr. Soriano accepts responsibility for the crime as stated in the record and can identify key characteristics and what he has done to remediate them. He is responding to treatment. He does not have a negative attitude and he does not have any active mental health symptoms. The inmate does need to be continuously involved in AA or NA. The recency of the inmate's [prison disciplinary] history record suggests some lingering impulsivity." With respect to the "risk management" aspect of the HCR-20, Starrett reported that Soriano "has handled compliance, stress, and destabilizers pretty well albeit within the institutional setting. The inmate's parole plans seem feasible and appropriate. He does appear to have family support."

Because Soriano cannot change his history, he apparently will never be able to improve his rating on the historical aspect of the HCR-20. With respect to the other two aspects of the HCR-20, the only apparent cause of a slightly elevated rating was Soriano's disciplinary history. As previously noted, Starrett's 2006 and 2008 evaluations overstated Soriano's prison disciplinary record, as well as burdening him with a non-existent drug arrest record and history of alcohol use. It is unclear whether and to what extent these errors played a role in Starrett's ratings or overall assessment of Soriano.

Starrett's 2008 evaluation was largely positive. Starrett noted that the absence of psychopathy and mental illness "decreases [Soriano's] violence potential and chance of recidivism upon release." Starrett identified other factors that would also tend to reduce Soriano's potential for violence: "Mr. Soriano accepts responsibility for the crime as stated in the record. He can identify key characteristics and how he has tried to remediate them. He realizes that he had a lot of problems as a child. He became a follower of these

kids in the area. He wanted to be like them. . . . He appears to have spent a considerable amount of time attempting to understand his background and other influences in the controlling case.” Other factors noted by Starrett as decreasing Soriano’s risk of violence are his lack of “violent history in the community,” his educational and vocational upgrades, his good work record, his self-help activities and religiosity, and his “reasonable and well developed” parole plans. Starrett also opined that Soriano “does not present as an imminent risk management problem in the community” and that he was not likely to violate parole.

To the extent the Governor focused on Starrett’s comment that Soriano’s “recent” prison disciplinary history “suggests some lingering impulsivity,” this ground for reversal essentially restates the Governor’s reliance on Soriano’s disciplinary record, which we have already addressed. In addition, Starrett’s characterization of Soriano’s 2002 disciplinary incident as recent was dubious in 2008, and the Governor’s reliance upon it two years later is even more questionable.

Notwithstanding the inclusion of “low moderate” in the range of the risk rating, the Board concluded that the 2008 evaluation was “a positive one” that supported granting Soriano parole.

The 2008 evaluation was merely “an addendum for update” of Dr. Hoffman’s 2007 evaluation. Hoffman also rated Soriano’s “risk of violence or recidivism” as “low to moderately low.” It appears that immutable historical facts played a significant role in the “moderately low” end of the rating range Hoffman assigned. Regarding the history of violence factor, Hoffman noted that Soriano’s “[a]ntisocial conduct appears to have been restricted to a period of perhaps two years prior to his arrest in the controlling offense. However, the criminal behavior appeared at a young age and was related to employment instability, school instability and being a substance abuser. It was also premeditated. While incarcerated there was one incident of violence, a Mutual Combat that occurred in 2002.” It does not appear that Hoffman was unduly concerned with the 2002 mutual combat incident, as indicated by his comments regarding the next factor in his

assessment, “Compliance with Board Requests and Treatment”: “The inmate has been compliant with Board requests and treatment. He has been disciplinary free for over five years and has the minimum classification score.”

The only factor about which Hoffman expressed concern was Soriano’s “history of alcohol and drug abuse.” Hoffman thus mistakenly attributed a history of alcohol abuse to Soriano. But Hoffman seemed satisfied that Soriano was reducing his risk of relapse by acknowledging his predisposition for addictive behavior and participating in AA and NA.

Overall, the 2007 evaluation was quite positive and supported parole. Hoffman commended Soriano on his “record of consistent participation in a variety of self-help activities such as anger management,” “NA and AA and Lifer’s Support Group.” He found that Soriano “accepts responsibility for the crime and has insight into the underlying factors that promoted criminal behavior,” expresses remorse, does not blame others, “evidences a positive attitude towards self-sufficiency,” “has acquired some skills that increase his probability for success,” has “a strong network of support from immediate and extended family,” shows attenuated impulsivity, and has no historical or current mental illness or “complicating mental health treatment needs.” Finally, Hoffman opined that Soriano has “shown maturity and responsibility in his record of near disciplinary-free behavior, vocational accomplishment, community involvement, and self-help.”

The 2006 evaluation by Starrett did not include an overall rating regarding Soriano’s risk of physical harm to others, but instead provided ratings on three of the same factors relied upon by Hoffman in the 2007 evaluation. Starrett rated Soriano “in the moderate range” on the “History of Violence” factor, and explained that this was “based on [Soriano’s] age at the time of the first violent act, relationship instability at the time, employment instability, school instability and being a substance abuser. Moreover, the crime appears to be premeditated.” Both the name of the factor and the explanation demonstrate that the elevated rating in this category is based on static historical facts. In

addition, Starrett's inclusion of erroneous historical facts in his 2006 and 2008 evaluations (nonexistent arrests for cocaine and marijuana and a history of alcohol abuse) casts doubt upon the reliability of his rating on this factor.

The partial rating in the 2006 evaluation cited by the Governor pertained to the clinical and insight factor, on which Starrett rated Soriano "in the low end of the moderate range." Starrett explained that the "rating is based on the fact that he received a discipline in 2002, reflecting some impulsivity. He needs to be discipline-free for a significant amount of time." At the time of the Governor's reversal, Soriano had been discipline-free for eight years, which is a significant amount of time. It is also worth noting that Starrett made positive comments with respect to this factor, as well: "[Soriano] accepts responsibility for the crime. He does have insight into his criminal personality. He does express remorse. He is trying to be prosocial."

Nothing in the 2008, 2007, and 2006 evaluations indicates that Soriano poses a current danger to the public if released on parole. The slightly elevated upper end of the range on the risk rating stated in each report is attributable to static historical facts that do not demonstrate Soriano's current dangerousness, especially in light of the tremendous progress he has made in rehabilitating himself. In addition, the inclusion of erroneous historical facts in each of these three reports creates doubt as to the accuracy of the ratings. The 2003 and 1999 evaluations, which did not include these historical errors, resulted in lower ratings of Soriano's risk potential and more positive overall evaluations. In 2003, Dr. Daniels concluded that Soriano posed a "moderately low" risk of danger to the public if he remains "drug-free" and "has a structured positive support system (such as family, NA, job environment, parole agent, etc.) to help him resist the pressure of negative influences." Daniels also wrote, "His response to programming has generally been excellent. His substance abuse appears to be in a sustained remission. He has an excellent family support system to help smooth his transition into the community, and he has consistently worked to improve his vocational skills and employability. He has matured and gained better insight into his own behavior. At the time of his crime, he was

described as ‘living in a childlike world’ and as having ‘many dependency needs.’ While incarcerated, he has learned to focus his energies in more prosocial and productive activities.” Daniels considered Soriano’s then-recent discipline for mutual combat, but nonetheless rated Soriano’s risk potential as moderately low.

In the 1999 evaluation (which was admittedly less probative because it was performed before the 2002 mutual combat incident), Dr. Jordan concluded that Soriano posed a low risk of violence upon release, and a “very low risk to re-begin the use of drugs and/or street gang activities.” Jordan concluded that Soriano’s “substance abuse and substance dependence” were in “sustained institutional remission” and his “commitment to remain drug-free seems sincere and strong. Given the fact that his drug usage was for a relatively short period of time during his youth, he seems at low risk to relapse.” Jordan further opined that Soriano “has matured greatly and has shown tremendous responsibility in prison. He has a great deal of remorse and empathy, such that most likely he would not re-offend in the community. He has taken a healthy and proper responsibility for his drug addiction and he continues to do what is needed, that being, remain in the programs of NA and AA.”

Given the focus on immutable historical factors, along with the incorporation of significant and damaging erroneous historical facts in the 2006, 2007, and 2008 psychological evaluations; the overall positive, albeit cautious, tone of the 2008 evaluation; the more positive tone of the 2007 evaluation; the still more positive and more factually accurate 1999 and 2003 evaluations; and the Board’s determination that the 2008 report was “a positive one” that it felt “comfortable with,” we conclude that the 2006, 2007, and 2008 reports cited by the Governor do not constitute “some evidence” that Soriano would pose a current danger to the public if released on parole. This is especially true in light of the 1999, 2003, 2006, 2007, and 2008 evaluations’ extensive descriptions of, and findings regarding Soriano’s personal growth and enhanced insight, with which the Board apparently agreed.

4. “Limited Participation” in Self-help Programs Regarding Gangs

The next ground for reversal cited by the Governor was his “serious reservations about [Soriano’s] limited participation in self-help programs to address his proclivity toward gang association. At his 2009 parole consideration hearing, Soriano told the Board that he had just begun participating in Criminals and Gang Members Anonymous (CGA) one month prior to the hearing. Given Soriano’s admission in the probation report that he joined a gang at age 16, I am concerned that he has not sufficiently addressed his gang-related criminality.” The Governor concluded, “Soriano’s limited participation in CGA or other such programs, combined with his recent rules violation for fighting demonstrates that he continues to pose a risk of danger if released to the community at this time.”

The Governor seemingly ignored aspects of Soriano’s record demonstrating that he repudiated his gang and gang lifestyle at least as early as 1995. Dr. Blasquez’s March 1995 psychological evaluation reported that Soriano “pointed out that he has completely cut all ties with his gang members.” Blasquez opined that “the ward has matured and he is not tied up with his gang group” Dr. Jordan’s 1999 evaluation reported that Soriano “stopped claiming his gang affiliation five or six years ago.” Jordan opined that Soriano “appears to be at very low risk to re-begin the use of drugs and/or street gang activities.” In 2007, Dr. Daniels observed that Soriano “evidences insight into the negative effects of gang life and drug abuse.” Daniels also observed that Soriano had been placed in the Sensitive Needs Yard in 2004 “due to enemy concerns.”

The Governor also seemingly ignored an extremely convincing factor: Soriano testified on two occasions against two of his fellow gang members and accomplices, as described in Hassett’s letter. By doing so, he placed himself in significant peril and effectively destroyed any chance of returning to the 18th Street gang or any other gang. He also did so without any consideration other than Hassett’s promise to write a letter to the Board if Soriano testified truthfully. Based on Soriano’s cooperation and his having

“done quite well . . . in prison,” the district attorney’s office did not actively oppose parole at his 2009 hearing.

In light of this record and the failure of even one of the evaluating psychologists to express concern that Soriano was likely to become involved in a gang again, the Governor’s singular focus on the short duration of Soriano’s involvement with a single self-help group with the word “gang” in its name does not constitute “some evidence” of Soriano’s current dangerousness.

5. Parole Plans Regarding Substance Abuse Relapse Prevention

The final factor cited by the Governor was his “alarm[] that Soriano is not adequately committed to his sobriety. Although he has participated in AA and NA while incarcerated, he has not developed a relapse prevention plan. The 2008 Board specifically noted that Soriano should establish such a plan and recommended that he provide the next Board panel with information on the substance abuse support groups available to him in Mexico. However, at his 2009 parole consideration hearing, Soriano did not provide information about any such programs in Mexico, nor had he formulated a relapse prevention plan.”

The Governor seemingly ignored significant portions of the record. Soriano told the Board what his “relapse prevention plan” was. He said one of his “top priorities” upon parole is to find an AA program, which he knows exists in Mexico. If Soriano had no history of involvement in AA or NA, this might not have been persuasive. But Soriano has consistently participated in AA and NA since at least 1999. Dr. Jordan opined in his 2003 report that Soriano’s “commitment to remain drug-free seems sincere and strong. Given the fact that his drug usage was for a relatively short period of time during his youth, he seems at low risk to relapse.” Even Starrett, who erroneously believed Soriano used alcohol, as well as drugs, remarked in his 2006 report that Soriano “appears to be taking care of [a risk of relapse] by being involved in treatment.” The Board discussed with Soriano his history of participation in AA and NA and quizzed him on his understanding of the 12 steps entailed in these programs. The Board was

apparently satisfied with Soriano's understanding of and commitment to these programs, and with his "relapse prevention plan." The Board also was not troubled by Soriano's lack of specific information about particular AA programs offered in Mexico. Soriano had attempted to obtain such information, but had not received it.

Soriano's brief use of cocaine and marijuana while hanging out with gang members does not constitute "some evidence" of his current dangerousness. There is no evidence that he currently uses drugs, or that his use of drugs more than 20 years ago would make him a present danger to the community if released on parole. His "*past* desire for and use of drugs does not by itself reasonably establish current unsuitability because there is no additional evidence to complete a chain of reasoning between his past drug use and a finding that because of it he currently poses an unreasonable risk of danger if released. In other words, in the absence of some evidence to support a reasonable belief that [he] *might* start using drugs again, the fact that he used drugs extensively more than 20 years ago does not by itself represent some evidence that he is currently dangerous." (*Smith, supra*, 114 Cal.App.4th at p. 371.)

Finally, we note that the Governor's criticism actually pertained to Soriano's parole plans. The Board and Starrett (in 2008) deemed Soriano's parole plans, which included multiple job and housing offers, realistic. Starrett even opined that his plans were "reasonable and well developed." In addition, Soriano had developed marketable skills in auto body repair (overlooked by most of the psychological evaluators), masonry, and plumbing. Although the Board and the Governor should consider whether an inmate has made realistic plans for release or has developed marketable skills, an opinion that different arrangements would be better is properly addressed by setting parole conditions, not denying parole. (*In re Powell* (2010) 188 Cal.App.4th 1530, 1543.)

For all of these reasons, the Governor's complaint that Soriano should have supplied the Board with more or different information about substance abuse groups in Mexico and his relapse prevention plan does not constitute "some evidence" that Soriano poses a current danger to the public if released on parole.

6. Conclusion

The Governor's reasons for finding that Soriano remains a public safety risk at age 38, more than 20 years after the commitment offenses, lacks any evidentiary support. Accordingly, we grant Soriano's petition for a writ of habeas corpus.

DISPOSITION

The petition for a writ of habeas corpus is granted, the Governor's decision is vacated, and the Board's order granting Soriano parole is reinstated.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.